90-481

No.

IN THE

Supreme Court of the United States

October Term, 1990

601 PROPERTIES INC.,

Petitioner,

against

CITY OF DAYTON, OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY, OHIO.

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN V. R. CONLON LLB (HONS)
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THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1990
(4306)

Question to be Presented.

Did the Montgomery County Courts act judiciously in allowing the respondent's motion of dismissal of the petitioner's Notice of Appeal?

Parties.

There is no parent or subsidiary company of the petitioner herein.

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TABLE OF AUTHORITIES.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990.

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601 PROPERTIES INC.,

Petitioner,

against

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY, OHIO.

PETITION FOR A WRIT OF CERTIORARI

Opinions Below.

The order of the Supreme Court of Ohio dated June 13, 1990, is printed herein as Appendix A. The opinion of the Court of Appeals of Montgomery County, Ohio, dated January 19, 1990, is printed herein as Appendix D. The decision and final judgment entry of the Common Pleas Court of Montgomery County, Ohio, filed on

March 24, 1989, is printed herein as Appendix F. The decision, final entry and order allegedly made by the City of Dayton, Ohio, Non-Residential Building Board of Appeals and filed on August 10, 1988, is printed herein as Appendix H.

Grounds for Jurisdiction.

Under the Provisions of 28 USC paragraph 1257, an appeal for certiorari to the United States Supreme Court from "final judgments or decrees rendered by the highest court of a state in which a decision could be had . . ." *Federal Jurisdiction: Tensions in the Allocation of Judicial Power,* Martin H. Reddish, Bobbs-Merrill Co., Inc., Charlottesville, VA 1980.

Statement of Facts.

The petitioner is an Ohio for-profit-corporation and is the owner of an unrenovated 55,000 sq. ft. warehouse building zoned industrial at 601 East Third Street in downtown Dayton, Ohio. The respondent is an Ohio Municipal Corporation. Before on or about March 14th, 1988, respondent posted a notice to the petitioner's building requiring the correction of alleged violations of the city's new non-residential building maintenance ordinance, namely Section 99.01 *et seq.* of the Non-Residential Building Maintenance Code of the City of Dayton, ROGO.

Under the provisions of the aforementioned city ordinance the said petitioner, by a letter dated March 31st, 1988, appealed the notice of violation and requested a hearing before the Non-Residential Building Board of Appeals (hereinafter referred to as "the Board").

Pursuant to ROGO Section 99.14 and 99.15 the hearing was held on July 7th, 1988, at the close of which the Board affirmed the notice of violation and the order for compliance against the petitioner. Sometime thereafter, the respondent issued their written decision and found against the petitioner. On August 10th, 1988, a certified copy of the Board's decision was received by the petitioner (Case No. 88-2).

Under Section 2505.07, the petitioner filed a notice of appeal to the Court of Common Pleas Court of Montgomery County, Ohio with the City of Dayton, Division of Inspectional Services on September 9th, 1988, appealing the decision of the Board. On April 13th, 1989 the respondent filed a motion to dismiss the said appeal on the grounds that the petitioner had failed to file a timely Notice of Appeal (Case No. 89-134 Montgomery County, Common Pleas Court).

By its decision filed on May 24th, the said Court of Common Pleas granted the respondent's motion to dismiss. The Montgomery County Court of Appeals affirmed the Court of Common Pleas decision by its judgment filed on January 31st, 1990 (Court of Appeals No. 11620). Subsequent appeal by the petitioner to the Supreme Court of Ohio was denied and judgment entered on June 13th, 1990 (Supreme Court of Ohio No. 90-531).

Arguments in support of petitioner's case.

1. Determination of the timely filing of the lodging of a notice of appeal must be based upon the best evidence available; failure to do so in this case was a denial of due process.

2. The Court of Common Pleas ignored the guiding provisions of Rule 44 of the Federal Civil Judicial Procedure and Rules which addresses United States Postal Services records.

3. Since the Non-Residential Building Maintenance Code is subordinate legislation seeking to impose upon property owners onerous duties without financial aid or compensation to the benefit of the respondent, the doctrine of *contra preferendum* should have been applied by the Court in this case.

1.

Determination of the timely filing of a Notice of Appeal must be based upon the best evidence available; failure to do so in this case was a denial of due process.

Section 2505.07 of the Ohio Revised Code provides as follows:

> "After the entry of the final order of an Administrative officer, agency, board, department, tribunal, commission or other instrumentality, the period of time within which the appeal shall be perfected, unless otherwise provided by law, is thirty days."

The nature of any appeal is that it is the legal right of any party in a proceeding to request of a superior legal body a review of a decision of the inferior entity. The abovementioned section restricts such an appeal by a time limitation of thirty days. Such an appeal is a judicial function and thereby bound by the rules of natural justice and common laws of evidence. By the time the respondents filed a motion to dismiss the petitioner's appeal on the grounds of the petitioner's failure to timely file the

Notice of Appeal with the Court of Common Pleas, the relevant documentation (i.e., a copy of the Notice of Appeal) had been with the court and the respondents for a period in excess of six months. Upon receipt of the respondent's motion on April 13th, 1989, and the petitioner's answer on April 20th, 1989, it must have been apparent to the Court of Common Pleas that there was a conflict as to the documentation before the court with particular emphasis on the handwriting on the rear of the return receipt cards. Furthermore there was no reliable evidence before it to ascertain the precise date of posting. Such evidence as the court had before it was at best hearsay and secondary. Where there is a conflict with regard to a document other evidence must be adduced to determine the authenticity and veracity of that document. The document does not speak and therefore cannot be cross examined.

In the circumstances of this case the Learned Judge should have been alerted to this conflict of evidence and the delayed filing of the respondent's motion to dismiss and applied the doctrine of best evidence. On the facts before this court the best evidence would have been for the court to have examined the return receipt cards and taken judicial notice of the postmark (Section 601 [a] [5] and [6], USC Title 39, The Postal Service).

The Learned Judge, in order to determine the validity of the handwritten dates on the reverse of the Return Receipt Cards, as well as the signature on one of them, should have called for oral evidence. There was no round stamp of the United States Postal Service appearing in Box No. 8, form 3811 (Appendix I).

The Court of Pleas, in allowing the respondent's motion to dismiss the petitioner's Notice of Appeal, made an administrative decision and thereby failed to act judi-

ciously. Such a judgment deprived the petitioner of any right to appeal any challenge to the enactment of the ordinance, the constitutional effect of any of said ordinance (i.e., the so-called "paint and scrape ordinance"), the acceleration of any tax benefits for the renovation of historical buildings without compensation or selective enforcement ("City uses new muscle on old foe over violations," see Appendix) he may have and thereby denied him due process.

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which the courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with the policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice" (*Hormel v. Helvering*, 312 US 562, 557, 61 S.Ct. 719, 721, 85 L. Ed. 1037 [1941]; footnote 98, page 34, West's *Handbook on Federal Evidence*).

2.

The Court of Common Pleas ignored the guiding provisions of Rule 44 of the Federal Civil Judicial Procedure and Rules which addresses the United States Postal Service records.

There is no evidence on the record that the Court of Common Pleas ever examined the postmark on the return receipt card nor was a certificate of mailing of the Board of Appeals submitted by the respondents in support of their motion to dismiss the petitioner's Notice of Appeal.

Under the abovementioned Rule 44, which refers to proof of official record, and accordingly the Court of Common Pleas would have satisfactory authentication of the date of mailing and receipt. In the absence of such proof the Learned Judge should have dismissed the respondent's motion (Section 201.4 Judicial Notice: Ascertaining the Appropriate Law. ". . . pleading and proof of the laws of the United States, whether embodies in statute or court decision, are neither necessary nor appropriate"). West's *ibid.*

3.

Since the Non-Residential Building Maintenance Code is subordinate legislation that imposes upon property owners onerous duties without financial aid or compensation to the benefit of the respondent, the doctrine of *contra preferendum* should have been applied by the Court in this case.

The benefit of this subordinate legislation lies with the respondent in this case. Challenge of notices, orders or other provisions to the Court of Common Pleas requires that the court applies the common law principles of the laws of evidence. In the instance of this case the court was requested to adjudicate the timely filing of the petitioner's Notice of Appeal by the motion to dismiss presented by the defendant. Additional to the obvious benefit to the respondent by the enforcement of the required maintenance in their original order to the petitioner, the respondent in being granted its motion by the court was able to enforce the ordinance without affording the petitioner due process and the opportunity for a full hearing.

It is submitted that in the context of these particular circumstances the burden of proving that the petitioner's Notice of Appeal was untimely rested upon the respond-

ent. The Court of Common Pleas, in considering such evidence as was presented by the respondent, should have placed a strict interpretation upon it. In the event of any doubt or uncertainty the Court should have found to the benefit of the petitioner. Undoubtedly the Post Office cards passed through many hands and were accessible to any number of unknown persons between the time of the filing of the Notice of Appeal and seven (7) months later when copies of the rear of the cards were presented for inspection to the Court.

CONCLUSION.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BENJAMIN V. R. CONLON LLB (Hons)
Barrister at Law of the Honourable
Society of Gray's Inn
Gray's Inn
London, England

Thorncreek Farm
Keene Valley Road
Elizabethtown, NY 12932-0937
Phone/Fax (518) 873-6346

APPENDIX A—Order of the Supreme Court of Ohio Dated June 13, 1990.

THE SUPREME COURT OF OHIO

1990 TERM

To wit: June 13, 1990

72-034

ENTRY

601 PROPERTIES, INC.,

Appellant,

v.

CITY OF DAYTON,

Appellee.

Upon consideration of the motion for an order directing the Court of Appeals for Montgomery County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by Michael J. Ellerbrook.

(Court of Appeals No. CA11620)

THOMAS J. MOYER
Chief Justice

Appendix B—Notice of Appeal From the Court of Appeals to the Supreme Court of Ohio.

IN THE

COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

SECOND APPELLATE DISTRICT

601 PROPERTIES, INC.,

Appellant,

vs.

CITY OF DAYTON,

Appellee.

Case No. 11620

Now comes Appellant, through counsel, and hereby gives notice of appeal to the Supreme Court of Ohio, appealing the decision of the Court of Appeals of Montgomery County, Ohio, Second Appellate District, filed January 31, 1990.

MICHAEL J. ELLERBROCK
Attorney for Appellant
4403 North Main Street
Dayton, Ohio 45405
(513) 275-0944
Registration No. 0023289

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Kenneth Barden, Attorney for Appellee, Registration No. 0041785, P.O. Box 22, Dayton, Ohio 45401, by ordinary U.S. Mail on the same date as filing.

MICHAEL J. ELLERBROCK
Attorney for Appellant

Appendix C—Final Entry

IN THE

COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

601 PROPERTIES, INC.,
Appellant-Appellant,

v.

CITY OF DAYTON,
Appellee-Appellee.

Case No. 11620

Pursuant to the opinion of this court rendered on the 19th day of JANUARY, 1990, the judgment of the trial court dismissing Appellant's administrative appeal is Affirmed.

RICHARD K. WILSON, Judge

JAMES A. BROGAN, Judge

MIKE FAIN, Judge

Copies mailed to:

Michael J. Ellerbrock
4403 North Main Street
Dayton, OH 45405

Arthur W. Harmon
P.O. Box 22
Dayton, OH 45401

Hon. Walter A. Porter

Appendix D—Opinion of Court of Appeals of Montgomery County, Ohio.

IN THE

COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

601 PROPERTIES, INC.,
Appellant-Appellant,

v.

CITY OF DAYTON,
Appellee-Appellee.

Case No. 11620

Opinion

Appeal argued on the 8th day of January, 1990.

Rendered on the 19th day of January, 1990.

Michael J. Ellerbrock, 4403 North Main Street, Dayton, OH 45405
Attorney for Appellant-Appellant

Arthur W. Harmon, P.O. Box 22, Dayton, OH 45401
Attorney for Appellee-Appellee

FAIN, J.

Appellant 601 Properties, Inc. ("Owner") appeals from the trial court's dismissal of its administrative appeal from a decision by the City of Dayton Non-Residential Building Board of Appeals. The Owner contends that

there was at least an issue of fact concerning the timeliness of its appeal to the trial court, which required a hearing. We conclude that although there may have been a genuine issue of fact as to the date that a copy of the administrative decision appealed from was mailed to the Owner's attorney for the second time, the Owner failed to contradict, by affidavit as required by Rule 2.09(b) of the Montgomery County Common Pleas Court Rules of Practice and Procedure, that the administrative decision was mailed to the Owner's attorney on a previous occasion and was received by the attorney's secretary on August 1, 1988. Therefore, we conclude that the trial court correctly determined that the Owner's notice of appeal filed September 9, 1988, was not timely, and the trial court did not err by dismissing the appeal. Accordingly, the judgment of the trial court dismissing the Owner's administrative appeal will be affirmed.

I

The Owner owns property located at 601 East Third Street, Dayton, Ohio. In March, 1988, the Owner received a Notice of Violation and Orders for Compliance setting forth certain claimed violations of the City of Dayton Revised Code of General Ordinances.

The Owner filed a written request for a hearing before the City of Dayton Non-Residential Building Board of Appeals, and a hearing was held on July 7, 1988.

Although the date of the Board's decision is contested, it is clear that the Board rendered a decision affirming the prior order, and returning the matter to the Building Inspector for further enforcement. Two versions of that decision are found in the record in this case. Both are reproduced in the appendix. What appears to be the original decision has what appears to be a computer-generated line at the bottom right side of the second and last page, as follows:

Date mailed ____ page 2 of 2

In the blank in the line quoted above there is inserted in blue ink, in hand writing, two dates. "Aug 9, 1988" is inserted immediately above the blank, and "July 29, 1988" is inserted immediately above the August date.

In opposition to the City's motion to dismiss the appeal in the trial court, the Owner filed a memorandum attached to which, as an exhibit, is what purports to be a certified copy of the same decision. The certified copy is identical to the original in all other respects, but on this copy there is inserted on the blank following "Date mailed", in hand-writing, the following: "8/10/88." The certification of this copy is dated August 10, 1988. Also in the record, as part of the transcript of the administrative proceedings, are two certified mail return receipts that purport to relate to the mailing of the Board's decision. Both are addressed to Michael Ellerbrock, being the Owner's attorney. One bears what purports to be Mr. Ellerbrock's signature and shows as the date of delivery August 13, 1988. The other bears the signature of someone purporting to be Mr. Ellerbrock's agent (apparently his secretary) and shows as the date of delivery August 1, 1988.

The Owner filed an appeal from the Board's decision on September 9, 1988.

The City moved to dismiss the appeal as untimely. The trial court, without a hearing, dismissed the appeal as untimely.

From the dismissal of its appeal, the Owner appeals to this court.

II

The Owner's sole Assignment of Error is as follows:

THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING THE NOTICE OF APPEAL OF 601 PROPERTIES, INC.; SAID APPEAL WAS FILED IN A TIMELY FASHION.

The administrative appeal to the Montgomery County Court of Common Pleas was subject to R.C. 2505.07, which provides as follows:

> After the entry of a final order of an administrative officer, agency, board, department, tribunal, commission, or other instrumentality, the period of time within which the appeal shall be perfected, unless otherwise provided by law, is thirty days.

A

The Owner first argues that the date of entry of the administrative order appealed from in this case is independent of the date of mailing of the decision, and cannot be determined from this record. In support of this contention, the Owner cites *Farinacci v. Twinsburg* (1984), 14 Ohio App. 3d 20; and *Swafford v. Norwood* (1984), 14 Ohio App. 3d 346. We agree with the City that the cases cited do not support the Owner's contention.

The holding in *Farinacci v. City of Twinsburg, supra,* is stated in the syllabus, as follows:

> A board of building and zoning appeals entered its final order, for purposes of perfecting an appeal to the trial court under R.C. 2505.07, at the time it sent written notification of its decision to the applicant, and not at the time the minutes of the board's meeting were filed.

Although, as the Owner notes, Judge George dissented in that case, her dissent appears to have been based, at least in part, upon the following reasoning expressed in her opinion:

> Here the board filled in the bottom portion of the variance appeal form. This was the form originally filed by Tri-County. While this portion did indicate the votes taken and set forth the board's reasons, it was undated and did not carry a notation of finality. There was nothing to indicate that this form, once completed at the bottom, was to serve as the official act of the board. Finally, there was nothing in the record to support the conclusion that the board had adopted this form as its official notification from which appeals should be taken. Therefore, Tri-County was justified in assuming that this form was nothing more than an informal recordation of the board's decision.

In the case before us, the document mailed to the Owner's attorney bore the caption of the administrative case, and was denominated "DECISION, FINAL ENTRY & ORDER." It was signed by all four members of the Board present and voting. It contained a section denominated "Findings of Fact," and a section denominated "Order." The latter section reads, in its entirety, as follows:

> Based upon all the evidence adduced, the Board upon motion duly made and seconded:
>
> The Board finds that the compliance time in the Order is reasonable and affirms the legal order of the inspector and returns the case to the inspector for further enforcement.

We conclude that this document, unlike the document described in Judge George's dissenting opinion in *Farinacci v. City of Twinsburg, supra,* clearly purports to represent the final act of the administrative agency.

In *Swafford v. Norwood Board of Education, supra,* the second case cited by the Owner, it was held that the time in which to perfect an administrative appeal begins to run when the agency's decision is entered into its minutes, even though notice of the decision is not immediately mailed to the parties. The court, while finding that the better practice is to give prompt notice of administrative actions to interested parties, analogized administrative decisions to decisions by courts of record in which the journalization of any final order, judgment or decree, "indisputably commences the running of time for perfecting an appeal." Thus, the court reasoned, the journalization of an administrative decision in a public place subject to inspection is sufficient to put interested parties on notice and to start their appeal time running.

The validity of the holding in *Swafford v. Norwood Board of Education, supra,* is suspect in view of the intervening case of *Moldovan v. Cuyahoga County Welfare Department* (1986), 25 Ohio St. 3d 293, in which it was held that the entry of a judgment upon the public records of a trial court and its publication in a local newspaper, without more, does not constitute reasonable notice to a party whose address, or whose counsel's address, is known. This court has applied *Moldovan* to administrative appeals. *Burton v. Ware* (Mar. 2, 1987), Greene App. No. 86-CA-54, unreported.

We agree with the City that the time within which to perfect an administrative appeal begins to run on the date upon which a copy of the document clearly constituting the final decision of the administrative agency is mailed to the party or his legal representative.

B

The Owner next contends that there is at least a factual issue in this case, requiring a hearing for its resolution, as to when the Board's decision was mailed to his attorney.

The City relies upon Loc. R. 2.09(a) of the Montgomery County Common Pleas Court, which provides as follows:

> The moving party shall serve and file with his motion a brief written memorandum setting forth the reasons in support of the motion and containing the citations of any authorities on which he relies. If the motion requires the considerations of facts not appearing of record, he shall also serve and file copies of all photographs or documentary evidence he intends to present in support of the motion in addition to the affidavits required by the Ohio Rules of Civil Procedure.

The City, in support of its motion to dismiss the administrative appeal as untimely, relied upon the original of the decision and entry contained in the administrative transcript filed in this case, which showed a date of mailing of July 29 and August 9, 1988, and also upon two certified mail return receipts, showing what purports to have been a receipt by the Owner's attorney on August 13, 1988, and what purports to have been a receipt by an agent for the Owner's attorney on August 1, 1988.

The Owner, on the other hand, relies upon what purports to be a certified copy of the administrative decision reflecting a date of mailing of that decision of August 10, 1988. If the administrative decision was mailed on August 10, 1988, then the Owner's administrative appeal was timely perfected; if the administrative decision was mailed on or before August 9, 1988, then the administrative decision was not timely perfected.

Missing from the Owner's evidence is any rebuttal, by affidavit or otherwise, to the certified mail return receipt contained in the administrative transcript of proceedings reflecting delivery of the decision to a person purporting to be the agent for the Owner's attorney on August 1, 1988. The August 1 date of delivery reflected in this return receipt is consistent with the July 29 date of mailing shown on the original administrative decision as contained in the administrative transcript of proceedings.

It is the City's contention that the administrative decision, for reasons that are not explained, was mailed twice, once on July 29, 1988, and once on August 9, 1988.

We conclude that the certified copy submitted by the Owner establishes, at most, that there is a dispute as to the date of the second mailing of the administrative decision to the Owner's attorney. That the Owner's attorney received the first mailing of the administrative decision on August 1, 1988, is clearly made to appear from the certified mail return receipt bearing that date, and is not contradicted by any affidavit of the Owner's attorney or the attorney's secretary. Accordingly, we conclude that the trial court was entitled to determine, based on the record before it, that the administrative decision had been mailed to the Owner's attorney some time before August 1, 1988, so that the notice of appeal from that decision was not timely filed.

The Owner's sole Assignment of Error is overruled.

III

The Owner's sole Assignment of Error having been overruled, the judgment of the trial court dismissing the Owner's administrative appeal will be affirmed.

* * *

BROGAN AND WILSON, JJ., concur.

Copies mailed to:

Michael J. Ellerbrock
Arthur W. Harmon
Hon. Walter A. Porter

Appendix E—Notice of Appeal From the Common Pleas Court to the Court of Appeals.

IN THE

COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

CIVIL DIVISION

601 PROPERTIES, INC.,

Appellant,

vs.

CITY OF DAYTON,

Appellee.

Case No. 89-134
(Judge Porter)

Now comes Appellant, through counsel, and hereby gives notice of appeal, appealing questions of law and fact regarding the "Decision and Final Judgment Entry" filed herein on May 24, 1989, to the Court of Appeals for Montgomery County, Ohio, Second Appellant District.

Respectfully submitted,

MICHAEL J. ELLERBROCK
Attorney for Appellant
4403 North Main Street
Dayton, Ohio 45405
(513) 275-0944

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Arthur W. Harmon, Jr., Attorney for Appellee, 101 West Third Street, P.O. Box 22, Dayton, Ohio 45401, by ordinary U.S. Mail on the same date as filing.

MICHAEL J. ELLERBROCK
Attorney for Appellant

PATRICK F. MEYER
CLERK OF COURTS

1989 MAY 30 AM 9:42

MONTGOMERY COUNTY

FILED—COURT OF

COMMON PLEAS

Appendix F—Decision and Final Judgment Entry.

IN THE

COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

601 PROPERTIES, INC.,

Appellant,

-vs-

CITY OF DAYTON,

Appellee.

Case No. 89-134
(Judge Walter A. Porter)

Pending for decision is the City of Dayton's motion filed April 13, 1989, to dismiss this administrative appeal for the reason that the notice of appeal was not timely filed. Counsel have filed memoranda supporting their respective positions so the motion is deemed ready for decision.

This administrative appeal is governed by R.C. 2505.07 which requires that the period of time within which the appeal shall be perfected is thirty days.

The Court has carefully reviewed the transcript of the proceedings held before the Non-Resident Building Board of Appeals for the City of Dayton and must conclude that the appeal was not timely filed.

Appellant 601 Properties, Inc. is the owner of the property involved in these proceedings. Its president is William Kuntz, III who apparently resides in Albany, New York.

Throughout the proceedings below, appellant was (and is) represented by attorney Michael Ellerbrock. Several of the notices that were mailed during the proceedings were directed to Mr. Ellerbrock and were either received by him or his secretary, Lora L. McGhee.

On July 7, 1988, the hearing was held before the Board, at which time Mr. Ellerbrock appeared for and on behalf of the appellant.

The decision, final entry and order of the Board was mailed to interested persons (including Mr. Kuntz and Mr. Ellerbrock) on two dates: July 29, 1988, and August 9, 1988. Return receipts indicate that Lora L. McGhee, Mr. Ellerbrock's secretary received the order on August 1, 1988, and Mr. Ellerbrock received the order on August 13, 1988. While there is no return receipt in the file for Mr. Kuntz, the file shows mailing of the order to Mr. Kuntz on July 29, 1988.

The notice of appeal was filed on September 9, 1988.

The Court believes that the time for appeal began to run on July 29, 1988, when the order was mailed. It was received in Mr. Ellerbrock's office on August 1, 1988, which is also more than thirty days prior to the filing of the notice of appeal.

Some confusion has developed here because on August 10, 1988, someone secured a certified copy of the Board's final order. This was apparently done by Mr. Kuntz, or someone else on his behalf. Unfortunately, the time for appeal had already begun.

Anthony for the court's position is found in *Farinacci v. Twinsburg,* (1984) 14 Ohio App. 3d 20, and *Lewis v. Parkinson,* (1981) 1 Ohio App. 3d 22.

While this court prefers to determine administrative appeals on their merits, it is clear that the failure to file a notice of appeal in a timely manner is jurisdictional.

The motion to dismiss is well taken and is SUSTAINED. This appeal is DISMISSED at appellant's costs.

SO ORDERED:

WALTER A. PORTER, JUDGE

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

MICHAEL J. ELLERBROCK, Attorney for Appellant, 4403 N. Main Street, Dayton, Ohio 45405 275-0944

ARTHUR W. HARMON, JR., Attorney for Appellee, 101 W. Third Street, P.O. Box 22, Dayton, Ohio 45401 443-4100

DEBORAH HEBERT, Bailiff

Appendix G—Notice of Appeal From Non-Residential Building Board of Appeals to the Common Pleas Court.

In the City of Dayton, Ohio
Division of Inspectional Services
Non-Residential Building Board of Appeals

601 PROPERTIES, INC.,

Appellant,

vs.

CITY OF DAYTON,

Appellee.

Case No. 88-2

Now comes the Appellant, through counsel, and hereby gives notice of appeal, appealing questions of law and fact regarding the "Decision, Final Entry & Order" filed herein on August 10, 1988, to the Common Pleas Court of Montgomery County, Ohio.

MICHAEL J. ELLERBROCK
Attorney for Appellant
4403 North Main Street
Dayton, Ohio 45405
(513) 275-0944

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Michael Dugan, Conservation Supervisor, Mezzanine Level, 101 West Third Street, P.O. Box 22, Dayton, Ohio 45401; and to Steven R. Milby, Assistant City Attorney, 101 West Third Street, Dayton, Ohio 45402, on the date of filing herein by ordinary U.S. Mail.

MICHAEL J. ELLERBROCK
Attorney for Appellant

Appendix H—Decision, Final Entry and Order Allegedly Made.

City of Dayton, Ohio

Department of Urban Development

Division of Inspectional Services

City Hall, 101 West Third Street, PO Box 22, Dayton, OH 45401

Non-Residential Building Board of Appeals

MICHAEL ELLERBROCK FOR 601 PROPERTIES, INC.,
Appellant,

vs.

CITY OF DAYTON,
Appellee.

Case No. 88-2

This matter came before the Non-Residential Building Board of Appeals pursuant to the appeals procedure in the Revised Code of General Ordinance, Sections 99.14 and 99.15 for hearing on the appeal of owner *601 Properties, Inc.* from the Notice of Violation and Orders for Compliance dated March 14, 1988 in which the inspector ordered the owner of the premises located at *601 E. Third Street,* Dayton, Ohio to correct the violations at said location which were alleged to exist.

On *March 31, 1988, 601 Properties, Inc.* filed a written

request for a hearing. Said hearing was held *July 7, 1988* at *2:00 P.M.* in the Mezzanine Floor Conference Room, 101 West Third Street, Dayton, Ohio.

Board Member Attendance:	**Present**	**Absent**
Ari Feldman, Present	X	
Perry Gounaris, Vice President	X	
Frederick Edmonds	X	
Joe Kosewic	X	
Michael Cromartie		X

Also Present were:

Gerald Tomkins, Conservation Specialist
Michael Dugan, Conservation Supervisor
Steven Milby, Senior Assistant Attorney

Case No. 88-2 *Finding of Facts*

Upon the evidence adduced at the hearing, each witness testifying under oath, the board makes the following findigns of fact:

Exterior Conditions, 1. Evidence of pigeon infestation on premises; 2. & 3. floor above rear loading dock, concrete has parts missing and rebar exposed in spots and the rear right spandrel beam has cracks and parts missing; 4. top rear concrete spandrel beam has loose and/or missing concrete; 5. left side overhead door brick work and concrete around door is damaged; 6. top left rear area bricks damaged and/or missing; 7. painted surfaces are peeling

throughout the exterior of the structure; 8. top of front, rear, and left side metal wall coping has loose and missing parts; 9. throughout the structure window glass is broken or missing; 10. left side overhead doors not maintained in rodent proof and/or weathertight condition.

Order

Based upon all the evidence adduced, the Board upon motion duly made and seconded:

The board finds that the compliance time in the order is reasonable, and affirms the Legal Order of the inspector and returns the case to the inspector for further enforcement.

This Decision was Approved by a Quorum of the Board

Approved By:

By Ari Feldman, President

By Perry Gounaris, Vice Pres.

By Frederick E. Edmonds

By Joe Kosewic

(Not Present)
By Michael Cromartie

July 29, 1988
Date mailed Aug. 9, 1988
page 2 of 2

Appendix I—Domestic Return Receipts.

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.

Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. ☐ Show to whom delivered, date, and addressee's address. *†(Extra charge)†*
2. ☐ Restricted Delivery *†(Extra charge)†*

3. Article Addressed to:

MICHAEL ELLERBROCK
4403 N MAIN STREET
DAYTON OH 45405

M Dugan/Decision/601 E Third

4. Article Number
4-8832

Type of Service:
☐ Registered ☐ Insured
☐ Certified ☐ COD
☐ Express Mail

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature — Addressee
X

6. Signature — Agent
X

7. Date of Delivery
8-13-87

8. Addressee's Address *(ONLY if requested and fee paid)*

PS Form 3811, Mar. 1987 ★ U.S.G.P.O. 1987-178-268 DOMESTIC RETURN RECEIPT

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.

Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. ☐ Show to whom delivered, date, and addressee's address. †(Extra charge)†
2. ☐ Restricted Delivery †(Extra charge)†

3. Article Addressed to:

Michael J. ELLERBROCK
4-03 N Main
Dayton OH 45405

M Dugan/601 E Third/Decision

4. Article Number
4-5949

Type of Service:
- ☐ Registered
- ☐ Insured
- ☒ Certified
- ☐ COD
- ☐ Express Mail

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature — Addressee
X

6. Signature — Agent
X Lisa L. McGlue

7. Date of Delivery
8-1-88

8. Addressee's Address *(ONLY if requested and fee paid)*

PS Form 3811, Mar. 1987 ★ U.S.G.P.O. 1987-178-268 DOMESTIC RETURN RECEIPT

Appendix J—Newspaper Article Dated February 18, 1988.

CITY USES NEW MUSCLE ON OLD FOE OVER VIOLATIONS

Kuntz told to repair
building on East Third

By Rosemary Harty
Staff Writer

The city of Dayton is tangling again with a familiar legal opponent: William Kuntz III.

At issue is a building Kuntz owns that is in violation of half a dozen city codes, according to city inspectors.

Dayton's building inspections department issued a violation notice and compliance order Monday to Kuntz regarding the building at 601 E. Third St.

The legal action is the first the city has taken under a non-residential building maintenance ordinance that went into effect Jan. 1, giving Dayton's Inspectional Services Department extra muscle in enforcing codes on commercial property.

An outspoken critic of the city, Kuntz has been fighting the city for three years over its acquisition of his property at 44 W. Third St. The city demolished the building to make way for Arcade Centre parking.

The Montgomery County Court of Appeals recently denied Kuntz's appeal in which he argued the city acted illegally in taking the downtown property. Kuntz was appealing a jury verdict that last year awarded Kuntz $235,000 for his property.

Jan Lepore-Jentleson, superintendent of inspectional services, said the city has attempted to work with Kuntz, but she said he has made only minor efforts to bring the East Third Street building up to code.

It's coincidental that Kuntz is the first property owner against whom the city acted, she said. Other building owners have agreed to the changes sought by inspectors, she said.

Kuntz could not be reached for comment Monday.

City inspectors said the building's problems include pigeon infestation, holes in the sidewalk, peeling paint, crumbling concrete and missing glass.

Parts of structural features on the roof are weakening and blowing off, prompting complaints from passers-by, she said.

The seven-story building, a former warehouse, has been vacant for at least 10 years.

Kuntz, a resident of New York, has until June to correct some problems, and until August on the more serious ones, she said.

No. 90-481

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

601 PROPERTIES INC.,
Petitioner,

vs.

CITY OF DAYTON, OHIO,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals, Second Appellate District, Montgomery County, Ohio.

BRIEF OF RESPONDENT CITY OF DAYTON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENT CITY OF DAYTON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE FACTS AND CASE

Because this case is concerned with the timely filing of a notice of appeal, the statements of the facts and case are combined herein to avoid repetition.

On March 14, 1988 an administrative notice of violation and order for compliance was issued to 601 Properties, Inc., (hereinafter "Petitioner") requiring the correction of violations of the City of Dayton's (hereinafter

"Respondent") non-residential building maintenance code.

On March 31, 1988, a written request for an appeal hearing before the Non-Residential Building Board of Appeals (hereinafter "Board") was served by the Petitioner upon the Respondent's division of Inspectional Services.

The hearing was held on July 7, 1988, at the close of which the Board affirmed the notice of violation and order for compliance.

The "Decision, Final Entry and Order" of the Board was issued in written form, and copies of it were mailed to interested persons on July 29, 1988 and August 9, 1988.

Certified mail return receipts indicate that, on August 1, 1988 and on August 13, 1988, copies of the Board's decisions were signed for and received by Michael J. Ellerbrock, counsel of record who had originally filed the notice of appeal on behalf of the Petitioner. This crucial fact is omitted from the Petitioner's Statement of Facts.

Thereafter, the Petitioner filed a notice of his intention to appeal the Board's decision to Common Pleas Court. This notice of appeal was time-stamped September 9, 1988.

Thus, the notice of appeal was not filed within thirty days of either of the two dates of issuance of the Board's decision, as required by state law. (i.e. July 29, 1988 or August 9, 1988).

The transcript of documents and testimony heard by the board (hereinafter "Transcript") was filed in the common pleas court in one volume on January 12, 1989.

On April 13, 1989, the Respondent filed a motion to dismiss the appeal on the grounds of the Petitioner's failure to timely file the notice of appeal. In support of its motion, the Respondent referenced various exhibits which were in the official transcript of the Board.

On April 20, 1989, the Petitioner filed a memorandum in opposition to the motion to

dismiss. Attached to the memorandum was a photocopy (not an original) of a certified copy of the Board's decision which the Petitioner claimed was the only notice of the decision of the Board which was received by the Petitioner. The Petitioner did not support this assertion by affidavit. Nor did its attorney, Mr. Ellerbrock, attempt to explain how he failed to receive either of the two copies of the decision for which he and his secretary had previously signed certified mail return receipts.

On May 24, 1989, the trial court filed its decision and entry sustaining the Respondent's motion to dismiss.

The Petitioner filed its notice of appeal to the Montgomery County Second District Court of Appeals from the above decision and entry on May 30, 1989.

The parties submitted their briefs to the Court of Appeals, and made oral argument. On January 19, 1990, the Court filed its Opinion, affirming the decision of the Common Pleas Court in dismissing the appeal.

On January 31, 1990 the Court of Appeals filed its final entry, dismissing the appeal.

On March 2, 1990 the Petitioner filed its notice of appeal to the Ohio Supreme Court, but the Petitioner's request was denied on June 13, 1990.

REASONS FOR DENYING THE WRIT

In Mullane v. Hanover B. & T. Co. (1949), 339 U.S. 306, 94 L. Ed. 865, the Court held that:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . The notice must be of such nature as reasonably to convey the required information . . and it must afford a reasonable time for those interested to make their appearance . . . But, if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied . . . But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

In New York v. New York, N.H.& H. RR Co. (1953), 344 U.S. 293, 296, 97 L. Ed. 333 the court held that:

> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice . . . But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication."

Thus, the court ruled that when the name and address of the party is known, notice by publication is inadequate.

In Moldovan v. Cuyahoga County Welfare Dept. (1986), 25 Ohio St. 3d 293, the state supreme court ruled that when the name and address of the party is known, notice by publication of a final entry of a court in a court-approved legal newspaper is inadequate.

Here, the required notice, in the form of a copy of the Board's decision, was not only sent by certified mail to the Petitioner's counsel; the evidence in the record also establishes that one copy of the decision was actually received by the attorney, and a second copy was actually received by his office secretary.

Section 2505.07 of the Ohio Revised Code provides as follows:

> After the entry of the final order of an administrative officer, agency, board, department, tribunal, commission, or other instrumentality, the period of time within which the appeal shall be perfected, unless otherwise provided by law, is thirty days."

In Farinacci v. Twinsburg (1984), 14 O. App. 3d 20, a board of building and zoning code appeals verbally announced its decision denying a variance, and issued a written decision, signed by its secretary and by its chairman of the board, within one week following the meeting. The Court of Appeals ruled that the board entered its final order, for purposes of perfecting an appeal to the trial court, at the time it sent written notification of its decision to the applicant.

The date on which the Board's decision was entered can be evidenced in numerous ways. It can be time-stamped by a mechanical stamping device upon the written entry, or in the absence of a mechanical stamp, it can be hand-written upon the entry. The manner in which the date of entry is evidenced is unimportant. It matters only that the date of entry be evidenced.

In the instant case, the date of mailing the decision is established as the date of entry,

because, by mailing the decision to the Petitioner, the Board unequivocally evidenced the fact that it regarded its decision as final. This procedure is expressly approved by the court in the Farinacci case, supra.

In the case at bar, §99.15(C) of the Revised Code of General Ordinances of the City of Dayton, Ohio (hereinafter "R.C.G.O.") provides as follows:

> The proceedings at such hearings, including the findings and decision of the board and reasons therefore shall be summarized and reduced to writing and entered as a matter of public record in the office of the Division of Inspectional Services."

The "Decision, Final Order and Entry" of the Board meets the above criteria for making a written summarization of the proceedings. The above provision does not require that the Board's decision and summarization be accomplished by two separate documents. In fact, such a practice could only contribute to bureaucratic delay. The effect of the above provision is to clearly and unequivocally define the decision, final order and entry of

the Board as a public record, and to assure its availability to any person upon request.

The Board's written decision in this case bore all the indicia of finality and was denominated, in bold letters, "Decision, Final Entry and Order." It contained a statement of the status of the case, recorded the presence or absence of Board members and others, it included findings of facts, and it reported the order of the Board, which affirmed the Legal Order. The decision concludes with an order that the case be returned to the inspector for further enforcement.

The decision records the fact that the witnesses testified under oath, and that the decision was approved by a quorum of the Board. The decision is approved and signed by all the members of the Board who participated in it, and the dates of mailing are recorded on it.

The Board did not simply enter its minutes upon the public record and leave it up to the parties or their attorneys to find out about it. Instead, the Board mailed two copies by

certified mail to the attorney for the Petitioner, one copy by certified mail to the statutory agent for the corporate Petitioner, and one copy to Mr. William Kuntz III. When the latter was returned unclaimed, another copy was sent by certificate of mailing. The extraordinary effort which was made by the Board to assure that its final entry actually reached the interested parties far surpassed that ordinary mail service which is almost universally used by the courts of this state and of the United States for the dissemination of final entries.

It cannot be fairly said that this is a procedure calculated to lull a party to sleep while his appeal time runs out. On the contrary, it clearly and unequivocally alerts the party and its counsel that this document officially and finally terminates the consideration of the case by the Board.

In the court of appeals, the Petitioner pointed to the case of Swafford v. Norwood Bd.

of Edu. (1984), 14 Ohio App. 3d 346, to support its argument that the decision of an administrative appeals board is not a final order until the board's minutes are formally recorded in a minute book.

While the Swafford case finds such a procedure acceptable, it does not hold that recordation in a minute book is the only acceptable procedure. Quite to the contrary, the court expresses not only its approval of, but its preference for the procedure which was utilized by the Board in the instant case:

> "While obviously the better practice would be to give prompt notice of such action to all interested parties, and, indeed, judicial notice may be taken that this is customarily done in all well-conducted agencies, the statute does not require such notice since, doubtless, in the usual and customary case, the information is readily available to anyone who desires to read it."

Moreover, it is abundantly clear that the copies reached their destinations in this case, as evidenced by the separate return receipts signed by the Petitioner's counsel and his secretary.

In the memorandum which the Petitioner filed in the trial court opposing the motion to dismiss, the Petitioner's counsel denied having received the copies of the Board's decision for which he and his secretary signed. The record of this case, however, contains no evidence upon which the trial court could have based a finding that he did not receive those copies.

Rule 2.09(b) of the Montgomery County Rules of Practice and Procedure of the Court of Common Pleas (hereinafter "Montg. Co. R.") provides, in relevant part, as follows with regard to motions to dismiss:

> "If the motion requires the consideration of facts not appearing of record, . . . [the party opposing the motion] . . . shall also serve and file copies of all photographs or documentary evidence which he intends to submit in opposition to the motion, in addition to the affidavits required by the Ohio Rules of Civil Procedure."

Thus, the Petitioner had an opportunity to be heard, either by affidavit or by requesting an oral hearing. Because the Petitioner failed to supplement the record with affidavits

supporting its claim that it did not receive a copy of the decision letter, there is no evidence in the record which would have justified the trial court in so finding.

The only evidence which was before the court on the question of whether the decision letter was received were the copies of the certified mail return receipts, which were signed and dated by Mr. Ellerbrock, the Petitioner's counsel, and his secretary, and which were included in the transcript of documents, on file with the trial court.

When confronted with this evidence, the trial court would clearly have abused its discretion if it had not dismissed the case.

In any event, upon the basis of the evidence before the trial court, that court certainly did not abuse its discretion in finding that the Petitioner was notified of the decision of the Board and that the Petitioner did not timely file a notice of appeal from that decision, and the Court of Appeals did not

err in affirming the decision of the trial court.

Wherefore, we respectfully request that the court decline to issue a writ of certiorari herein.

CONCLUSION

This case is not one which raises a question as to whether a form of constructive service of a notice is constitutionally adequate. As we have shown, in this case, the evidence discloses that the Petitioner's legal counsel actually received the notice by certified mail, and signed a return receipt to acknowledge that he received it. Thus, this case raises no issues of federal constitutional proportions.

This case involves only the question of whether or not the Petitioner herein has complied with the clear and unequivocal procedural requirements of city ordinances, state laws and local rules of court.

Accordingly, this is not an appropriate case for the issuance of a writ of certiorari because this case does not question the validity of a statute of the United States or of a state, and because the facts of this case clearly and unequivocally demonstrate that no title, right, privilege, or immunity has been violated.

Accordingly, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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